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No. 71-66

In the Supreme Court of the United States

OCTOBER TERM, 1971

MARVIN GUON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial, petitioner was convicted in the United States District Court for the District of Oregon, on both counts of a two-count indictment which charged the making of false statements in connection with a Federal Housing Authority loan application (18 U.S.C. 1010). On September 9, 1970, he was sentenced to ninety days' imprisonment as to Count I; as to Count II, imposition of sentence was suspended and petitioner was placed on probation for three years. The court of appeals affirmed the conviction.

441-249—71

The undisputed evidence (Pet. 5) showed that on November 15, 1967, in an application for a federally insured bank loan to be used for a housing improvement, petitioner failed to disclose that he owed approximately $2,000 to the United States for past due income taxes (Count I) and that he owed a judgment creditor approximately $7,000 (Count II).

1. The indictment charged that petitioner made the false statements in a Federal Housing Administration Credit Application for the purpose of obtaining a loan from a Portland bank "with intent that such loan would be offered to and accepted by the Department of Housing and Urban Development for insurance." At trial, the court in its instructions failed to identify the federal agency to whom petitioner's loan application would be submitted. There was no objection to the charge (see Pet. 8); nor was there any dispute about the fact that the application for an F.H.A. loan was presented to the Department of Housing and Urban Development as charged in the indictment. Indeed, petitioner writes: "* * * there is scarcely a home owner that has not applied for a home improvement loan, which is essentially synonymous with an F.H.A. loan" (Pet. 6). Consequently, any failure in the instructions to identify the defrauded federal agency was harmless. See *United States* v. *Jackson,* 436 F. 2d 39 (C.A. 9); *Brown* v. *United States,* 334 F. 2d 488, 491–492, 497–501 (C.A. 9), affirmed on other grounds, 381 U.S. 437; *Guy* v. *United States,* 336 F. 2d 595 (C.A. 4).

2. Petitioner's contention that the statute involved is so broad that it could be used to punish a defendant

with a benign purpose (Pet. 9–11) has no application to petitioner. The jury was told that petitioner could be convicted only if he deliberately understated his liabilities and not if misstatements were unknowing or negligent (see Pet. 5). Thus, the jury found that his purpose was to mislead, to its detriment, the government agency to whom his loan application was forwarded.

3. The fact that the indictment described the income tax indebtedness as a tax lien (Count I) whereas the tax lien was not formally filed until after petitioner had submitted his credit application (Pet. 12) is, as the court below held, an immaterial variance. It did not matter when the lien was filed because the application required disclosure of any past due obligation, whether reduced to a lien or not. As early as August 1967, three months before submission of his loan application, petitioner had acknowledged his income tax liability of over $2,000 (Pet. App. C. 19).

4. As to the suggested appellate review of sentences (Pet. 12–13), petitioner's argument has no bearing in this case where, on felony convictions, petitioner was sentenced to ninety days' imprisonment and three years' probation. In view of the light sentences imposed there is clearly no occasion here to reconsider the Court's ruling in *Blockburger* v. *United States*, 284 U.S. 299, that the extent of punishment, even if severe, is to be determined by the trial court "with whose judgment there is no warrant for interference on our part" (248 U.S. at 305); *United States* v. *Rosenberg*, 195 F. 2d 583, 604 (C.A. 2), certiorari denied,

344 U.S. 838; see *Gore* v. *United States*, 357 U.S. 386, 393.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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